REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL DIVISION

PETITION NO. 396 OF 2014

IN THE MATTER OF: ARTICLES 19, 20,21,23,27,29,35(2),47,50&55 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 27, 35(2), 47, 50(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: IN THE MATTER OF DECISION OF KENYATTA UNIVERSITY STUDENTS DISCIPLINARY COMMITTEE OF 4TH AUGUST 2014 AGAINST PAUL KURIA KIORE

BETWEEN

PAUL KURIA KIORE ……..……PETITIONER

VERSUS

KENYATTA UNIVERSITY……..RESPONDENT

JUDGEMENT

Introduction

1. The Petitioner is a student at Kenyatta University, who is undertaking Electrical Engineering in his final year of study.

2. The Respondent herein, Kenyatta University (hereinafter referred to as "the University") is described as a parastatal governed by provisions of the ***Universities Act, 2012***, that repealed ***Kenyatta University Act*** (Chapter 210 of the Laws of Kenya).

Petitioner's Case.

3.According to the Petitioner, on the night of 27th March 2014, a laptop belonging to a neighbouring

student to the Petitioner in the halls of residence was allegedly stolen. The said theft was reported to the university security department. After investigations the Petitioner was suspended from the University in May 2014 pending disciplinary proceedings and action. The said disciplinary proceedings hearing were conducted on 12th June 2014, at which hearing the Petitioner was summoned, but according to him, he was kept in a waiting bay while the complainant, one **Noah T. Kinyo** was summoned to appear before the Committee to testify, in absence of the Petitioner.

4. After the said complainant's testimony, the Petitioner was then called in, but he did not examine the Complainant on his testimony. According to the Petitioner, the facts and substance of the testimony of the Complainant as summarized to him was that on the night of 27th March 2014, since the Petitioner and the Complainant were neighbours in adjourning and portioned rooms, the Complainant placed his laptop on a table near a window of his room, and slept, the Petitioner must have used a stool on his side of the room, overreached his hand, undid the door latch of the Complainant's door from inside, opened his door, when the complainant was asleep and stole the laptop.

5. According to the Petitioner, he denied the said allegations. He averred that there was no independent witness of the events alleged as the only testimonies were of the Complainant and the Petitioner. The Petitioner averred that he intended to testify before the committee as follows;

i. That he did not steal the laptop as alleged or at all;

ii. That he did not overreach the complainant's door latch as alleged or at all;

iii. That if at all there was a laptop in the complainant's room as claimed, laptops and other valuables had been stolen through windows in the Kilimambogo Hostels and such incidents had been reported to security;

iv. That he had witnesses who would attest to (ii) above.

6. However, the Petitioner averred that he did not get to tender this testimony nor were his said witnesses heard but was instead repeatedly interrupted and only asked 'why he stole the laptop'.

7. After the 'hearing' on 12th June 2014, the committee did not render the decision immediately despite several letters addressed to the University by the Petitioner's guardians of the Petitioner wrote severally to the University. It was until 4th August 2014 that the same was rendered which decision was received by the Petitioner on 5th August 2014. By the said decision, the Petitioner was suspended for one (1) year, ordered to pay Kshs 40,000.00 to the complainant before re-admission and expelled the Petitioner from the halls of residence.

8. According to the Petitioner, on or about 30th March 2014, his laptop was also stolen from his room and despite reporting the same to the University's security department, the University did not take any action.In the Petitioner's view, the Respondent has no jurisdiction to investigate complaints of criminal culpability as that is the exclusive province of the Kenya Police. To him therefore the undertaking by the Respondent of investigating theft was *ultra vires* its jurisdiction and void.

9. He further averred that the Respondent has jurisdiction to *try* any person for a criminal offence and to find any persons guilty or otherwise for a criminal offence that is the exclusive province of the courts under the ***Criminal Procedure Code*** (Chapter 75 of the Laws of Kenya). To him, the Respondent's finding of guilt of theft was *ultra vires* its jurisdiction and void.

10.It was the Petitioner's case that there were flaws in the procedure adopted by the University with respect to the Petitioner's right to fair trial and fair administrative action in that he was kept out of the hearing center during testimony of his accuser; he was not given occasion to confront the testimony of the accuser through cross examination or even hearing it; he was not allowed to finish his defence/testimony against the charge but was interrupted throughout the few minutes he was before the committee; he was

not given occasion to call his witnesses in defence; he was suspended from the institution in May before hearing of the matter which would either find him culpable or not, hence his guilt was adjudged before even hearing; he was not allowed defence or even equal time of presentation of testimony as was allowed the complainant; whereas the complainant was allowed to rely on reports of the security department of the institution, the Petitioner was denied occasion to call witnesses in rebuttal; and whereas the Respondent was interested in taking action on the complaint of the complainant against the Petitioner, it unfairly and preferentially neglected to take action in the complainant by the Petitioner.

11. The Petitioner asserted that his trial and conviction by the respondent for theft was unfair and violated his right to fair administrative action guaranteed by Article 47(1) of the Constitution on Kenya. Further, the failure by the Respondent to give written reasons for the conviction by the respondent of theft violated the petitioner's right to fair administrative action guaranteed by the same Article. To the Petitioner, his conviction in the manner and circumstances above is egregiously unconstitutional; it was unfair and grossly unlawful for want of jurisdiction, erroneous and unreasonable. To him, the Respondent found him guilty of theft notwithstanding that there was no evidence linking him to theft, but instead, a host of exculpatory evidence blocked by the respondent from the hearing.

12. It was the Petitioner's view that the failure by the respondent to take equal action upon his complaint over loss of his laptop, yet prosecute and persecute the petitioner over loss of laptop by the complainant against the petitioner, was discriminate treatment and violated his right from protection against discrimination guaranteed by Article 27 of the constitution.

13.According to the Petitioner, he was convicted wholly without evidence. No evidence whatsoever of any person at all seeing the Petitioner enter the complainant's room and steal. There was purely conjecture that the petitioner must have stood on a stool on his side of the room, overreached his hand, undid the door latch of the complainant's door from inside, opened his door, when the complainant was asleep and stole the laptop. The testimony that valuables had been stolen through the window of rooms was completely ignored. This is all that was relied upon to find the petitioner guilty and punish him. This is grossly unreasonable.

14. The Petitioner therefore contended that it was critically necessary that the Court considers and grants the reliefs prayed herein, to protect his fundamental rights and to vindicate the constitution of Kenya.

15. The Petitioner therefore sought the following orders:

1. **A declaration that finding of the Respondent carried in the Respondent's letter dated 4th August 2014 finding the Petitioner guilty of theft was without jurisdiction and void and contravened the Petitioner's right to fair trial guaranteed by article 50(1) of the Constitution of Kenya;**
2. **A declaration that finding of the Respondent carried in the Respondent's letter dated 4th August 2014 finding the Petitioner guilty of theft contravened the Petitioner's right to fair administrative action guaranteed by article 47(1) of the Constitution of Kenya;**
3. **A declaration that failure to give the Petitioner reasons for conviction for theft contravened the Petitioner's right to fair administrative action guaranteed by article 47(2) of the Constitution of Kenya;**
4. **A declaration that failure by the Respondent to allow the Petitioner in the hearing room when the Complainant Noah T. Kinyo was testifying before the Student Disciplinary Committee of the Respondent was unfair and contravened the Petitioner's right to a fair trial and fair administrative action guaranteed by Article 47 and Article 50 (1) of the Laws of Kenya and the substance of Natural Justice rules;**
5. **A declaration that failure by the Respondent to allow the Petitioner to cross examine the Complaint Noah T. Kinyo and to allow the Petitioner to call witnesses before the Student Disciplinary Committee of the Respondent was unfair and contravened the Petitioner's right to a fair trial and fair administrative action guaranteed by Article 47 and Article 50(1) of the Constitution of Kenya and the substance of Natural justice rules;**
6. **An order of *certiorari* quashing the decision of the Respondent carried in the letter dated 4th**

August 2014.

7. **An order of *mandamus* against the Respondent directing them to administer to the Petitioner end of Semester exams commencing August 2014**
8. **Any other relief the Honorable Court may see fit to grant.**
9. **Order for damages to compensate and alleviate the composite prejudice, pain and suffering of the Petitioner;**
10. **The costs of the Petition.**

16. In his submissions the Petitioner cited the decision of **Majanja, J** in **Dry Associates Ltd vs. Capital Markets Authority and Another Petition No. 328 of 2011** in which the learned Judge held that:

> **"Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is nolonger left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but it is to be measured against the standards established by the Constitution."**

17. On the issue of bias, the Petitioner relied on **University of Ceylon vs. Fernando [1960] All ER 631** quoted in **Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others [2013] eKLR**, that:

> **"In disposing of a question which was the subject of an appeal before it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, in as much as that was a duty which lay on everyone who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view."**

18. On the issue of jurisdiction, the Petitioner was of the view that based on Where the University rules and regulations provide for the application of the rules of natural justice in the University's disciplinary proceedings, the Petition submitted that this was not adhered to. In his view, not only was he not given an opportunity to confront the testimony of the accuser, but was not afforded an opportunity to even hear the Complainant's submission before the Committee. To aggravate the matter, he was not even allowed to finish his testimony against the Complainant as he was interrupted throughout the few minutes he was before the Committee. The Petitioner cited in support of his case **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] KLR** and **Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others [2013] eKLR** where the Court held that the right to hearing is of fundamental importance in the Kenyan justice system and even when it is not expressly provided for in the statute it must be implied in every act including when making an administrative action and it cannot be taken away and that no one should be condemned unheard. Reliance was also placed on **Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] KLR** and **Salvarajan vs. Race Relations Board [1976] 1 All ER 12** .

19. On the issue of bias, the Petitioner relied on **University of Ceylon vs. Fernando [1960] All ER 631** quoted in **Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others [2013] eKLR**, that:

> **"In disposing of a question which was the subject of an appeal before it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, in as much as that was a duty which lay on everyone who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view."**

20. With respect to jurisdiction, the Petitioner agreed with the holding in **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others** (supra) that where the

offence constitute the tort of trespass to property or conversion, there would be no objection to the Respondent exercising jurisdiction since these are torts against property. He was however not of the same view with respect to theft or such offence as rape.

Respondent's Case

21. In response to the application, the Respondent averred that upon his admission to the University, the Petitioner accepted the offer and signed a letter of acceptance of the offer and accepted to abide by the University rules and regulations governing the conduct and discipline of the University students dated 30th April, 2009.

22. According to the University, under the General offences, the Senate Students' Disciplinary Committee is tasked with dealing with all general offences committed by students in their day to day activities within the University other than the offences the University considers as major offences. In its view, the University rules and regulations spell out the penalties for the various general offences, which penalties vary according to the gravity of the offence which include suspension from the University for a specific period.

23 The said regulations, it was contended also provide that a student shall be afforded an opportunity to be heard before the said Committee makes its decision.

24. According to the Petitioner, on 27th March, 2014, **Noah T. Kinyo**, a student at the University made a complaint regarding the loss of his laptop and stated that his laptop was stolen in the dead of the night and that his roommate, the Petitioner, was the prime suspect.

25. Upon receipt of the internal memo from the Director for Security Services recommending that the matter be forwarded to the said Students' Disciplinary Committee, it was contended that the Office of the Registrar-Academic suspended the Petitioner pending appearance and determination before the said Committee.

26. On 12th June, 2014, the Petitioner appeared before the said Committee where the charge of stealing a laptop computer belonging to **Noah T. Kinyo** was put to him, and the Petitioner was given the opportunity to present his defence and was informed of his right to appeal to the Vice-Chancellor against the decision of the Committee. On 4th August, 2014, the Petitioner was informed of the decision by the Committee to suspend him for one academic year but he did not exercise his right of appeal.

27. Based on legal advice, the Respondent contended that natural justice does not require demand that proceedings before quasi-judicial tribunals or bodies be as formal as court processes as that would defeat the purpose of having the quasi-judicial bodies outside the regular court system. To the University, the most important and underlying principle should be impartiality and an opportunity for every person being given an opportunity to present their case.

28. To the Respondent the due process was followed in the conduct of the said disciplinary proceedings.

29. It was submitted on behalf of the Respondent that whereas the Petitioner alleged that his right to fair administrative action under Article 47 of the Constitution has been violated, he failed to prove the allegations. In the Respondent's view, the proceedings before the disciplinary committee duly complied with the constitutional provisions and that the Petitioner herein failed to exhaust the appeal procedures with the Respondent before coming to court. To the Respondent, the Petitioner was informed of his suspension from the university through the letter dated 25th April 2014 and the theft incident occurred on 27th March 2014. Investigations had to be conducted during the period in between the said dates hence there was no delay in informing the Petitioner of the suspension and charges to expect on appearing before the Student Disciplinary Committee.

30. In the University's view, the disciplinary procedure was fair from the onset as the Petitioner was duly

notified of his suspension for reasonable suspicion of having stolen a laptop belonging to **Noah T. Kinyo** at Room 234 which they jointly occupied. Further, the letter stated that the suspension was in accordance with the University Rules and Regulations which empowered the Student Disciplinary Committee to deal with all general offences committed by students in their day to day activities within the University save for major offences. The offence of stealing a laptop, according to the University, falls in the category of offences that can be dispensed with by the Committee under the Respondent's rules and regulations. In support of this submission the Respondent relied on **Oluoch Dan Owino vs. Kenyatta University [2014] eKLR**, where it was stated that an educational institution has the right to set certain rules and regulations and those wishing to study in that institution must comply with such rules.

31. To the university, the procedure adopted by the committee was fair and in accordance with the rules and regulations and the court ought not to interfere with it. If the Petitioner desired to challenge the decision, he should have appealed to the Vice Chancellor as he was informed by the committee. The Respondent urged this Honorable court to uphold the same. The Respondent cited **Civil Appeal No. 180 of 2013 - Isaack Osman Sheikh vs. IEBC & Others** and **Daniel Nyongesa and Others vs. Egerton University College CA No. 90 of 1989.**

32. It was therefore submitted that the Student Disciplinary Committee was properly constituted in accordance with statute and the Petitioner given an opportunity to exercise his constitutional right to be heard. Apart from making the allegations, the petitioner has not presented any evidence on the basis of which the Court could make the findings that his right to fair administrative action has been violated. To the Respondent, the Petitioner's suggestion that he was not given an opportunity to confront the testimony of his accuser and that he did not finish his testimony are baseless. To the contrary, the Petitioner had the opportunity to request for the same before the committee but he failed to do so. Further, the Petitioner was informed that he had the right to appeal against the decision to the Vice Chancellor but he failed and/or refused to do so. In this respect the Respondent relied on **Republic vs. Kenyatta University and 2 Others Ex Parte Jared Juma, HC Misc Civil App No. 90 of 2009** and **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**.

33. It was the University's position that as per the rules of natural justice, proceedings before quasi-judicial bodies are not the same as court proceedings and if the Student Disciplinary Committee is to be treated like a regular court system then that would defeat the very purpose of having the committee outside the court system. To it, as long as the Petitioner was given a chance to be heard and the decision was fair, then the proceedings were properly conducted. In this case, it contended the committee was unbiased and gave the Petitioner an opportunity to present his case and the Petitioner presented a weal case which could not sustain a finding of innocence on from the committee even after due procedure was followed. It relied on **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009**, **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009, Eliud Nyauma Omwoyo & 2 Others vs. Kenyatta University [2014] eKLR.**

34. To the Respondent, the Petitioner was granted audience before the Disciplinary Committee and had a chance to cross-examine the witnesses and to call his own witnesses which he forewent. The Petitioner did not provide any defence to the allegations. Rather, he casually stated that cases of laptop theft were common within Kilimambogo Hostels and even wondered why the committee was investigating such a case. The Petitioner failed to exercise his right of appeal through the available avenues probably because he has no sufficient grounds to challenge the decision.

35. To the Respondent, the allegations that the Respondent was biased towards the Petitioner since the Student Disciplinary Committee relied on an investigation report by the Security Department cannot be entertained and is farfetched. To the contrary, its decision to suspend the Petitioner was merited because the university security officers were well within their mandate in investigating the matter.

36. It was submitted that since the Respondent's rules and regulations, which the Petitioner agreed to be bound by, provide that the Senate's Student Disciplinary Committee shall deal with all general offences committed by students in their day to day activities within the University other than offences the university considers major, it was only proper for the university security officers to conduct the

investigations. The university cannot be reasonably expected to outsource investigators for offences committed within it which are handled by the disciplinary committee. Further, being mandated to conduct the disciplinary hearing, the committee had the discretion to decide which witnesses to call and since the complainant reported the theft to the security officers who investigated the matter, it was only proper for the committee to consider the report. To the University, from the minutes of the proceedings of the Student Disciplinary Committee on record, there is nothing to show that the committee entirely relied on the evidence of the security officers. The evidence was corroborated with that of **Noah T. Kinyo** together with circumstantial evidence. The proceedings of the Students Disciplinary Committee were conducted lawfully in line with the Kenyatta University statutes and in accordance with the rules of Natural Justice and that decision was informed by the evidence.

37. On the allegation that the Petitioner was not allowed to bring any evidence and call witnesses to the disciplinary hearing, the Respondent retorted that it was not its duty to educate the Petitioner on how to prepare a strong defence. If the Petitioner had sufficient evidence to prove he is innocent of the theft charges, then he should have submitted evidence and called witnesses, or at least informed the committee that he had evidence to rebut the complainant's allegations and should be given time. The Petitioner must not only allege that he is innocent but must also adduce evidence in support of the same. The University relied on **Peris Wambogo Nyaga vs. Kenyatta University [2014] eKLR** in which the court stated that:

"The applicant further contended that the case that she was to face ought to have been disclosed to her to enable her prepare for the case. Again from the records there is no evidence that the applicant did seek that she be supplied with the materials which was to be used against her.

38. Further support for this proposition was sought from **Michael Fordham** in ***Judicial Review Handbook*; 4th Edn. at page 1007** that:

> **"Procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case"**

24. On the issue of jurisdiction to investigate offences of a criminal nature, it was submitted that the proceedings before the Student Disciplinary Committee were not criminal but disciplinary in nature and that the Respondent has its own internal mechanisms to address theft and other indiscipline case which cannot be ousted by the criminal procedure. To the University, through the university statutes, the committee is given authority to punish undisciplined students through the disciplinary hearing. Further, judging by the punishments provided by the Respondent's Rules and Regulations, the proceedings cannot be said to be penal in nature. The complainant, if he so desired could have reported the matter to the police who would initiate criminal proceedings against the Petitioner. The proceedings before the disciplinary committee are separate and distinct from criminal proceedings under the ***Criminal Procedure Code***.

25. According to the Respondent, clause 4 of the Respondent's Rules and Regulations on Disciplinary Procedures states that "*The Committee deals with all general offences committed by students in their day to day activities within the university other than offences the University considers as major offences*". In its view, the punishment meted by the committee, to wit, suspension of the Petitioner for one academic year from May 2014, payment of Kshs.40,000/= being cost of the laptop and expulsion from the Hall of Residence are not criminal in nature but are merely disciplinary. To the University, in criminal proceedings, a guilty finding may lead to a prison sentence or a fine or both but before the committee such sanctions are unavailable. The Kshs.40, 000/- was to compensate the complainant for the loss of the laptop which the Petitioner was adjudged to have stolen. In this respect the Respondent relied on this Court's decision in **Zachariah Wagunza & another vs. Office of the Registrar Academic Kenyatta University & 2 others [2013] eKLR** and **Alex Mburu Gitau vs. Kenyatta University [2015] eKLR.**

26. In view of the foregoing, it was submitted that the Respondent's Student Disciplinary Committee decision to discontinue the Petitioner from studies was just, unbiased, fair, expeditious, constitutional and

abided by the rules of natural justice.

27. The Respondent accordingly urged the Court to dismiss the petition since, in his view the petition is a desperate and futile attempt to overturn an administrative action which was fair, expeditious, just and unbiased and founded on concrete evidence that the Petitioner violated the Respondent University's Rules and Regulations as presented in the Letter of Acceptance to abide by University Rules and Regulations duly signed by the Respondent on 30th April 2009.

Determinations

39. I have considered the issues raised in this petition.

40. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

41. Similarly in **David Mugo vs. The Republic Civil Appeal No. 265 of 1997** the Court of Appeal held that so long as orders by way of judicial review remain the only legally practical remedies for the control of administrative decisions, and, in view, of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review orders shall continue extending so as to meet the changing conditions and demands affecting administrative decisions.

42. That the Respondent has powers and jurisdiction to discipline students is not in dispute. There is also no question that the Respondent was empowered to suspend the Petitioner. The first question however is whether the Respondent had the jurisdiction to embark on the inquiry the subject of these proceedings. The only question therefore would be whether there were conditions precedent for the invocation of the afore-cited provisions. In this respect in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that a limitation to jurisdiction may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics.

43. It follows that even if the Respondent had jurisdiction to discipline the Petitioner and mete the punishment it gave, if in the circumstances of the case, it had no power to embark on the particular inquiry in the sense that that inquiry was not one in which it had jurisdiction, or if in the course of the inquiry it exceeded its jurisdiction, the Court would be entitled to interfere. In this case, it was contended that the Respondent had no power to inquire into and try alleged criminal acts.

44. As appreciated by all the parties to these proceedings, this Court has had occasion to deal with a similar issue in **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others** (supra) where the Court expressed itself as follows:

> **"The next ground relied upon by the applicants is that the Students Disciplinary Committee entertained a criminal case when it had no jurisdiction to do so. That theft is a criminal offence cannot be doubted. However theft may also constitute the tort of trespass to property or conversion. It is therefore my view and I hold that theft or conversion may well fall under "general offences". To hold otherwise would in my view take away with one hand the powers given to the Disciplinary Committee to discipline errant students by the other hand. Accordingly, the mere fact that the allegations made against the applicants could well have been tried in a criminal court did not deprive the Respondents of the jurisdiction to investigate the same since the alleged offence occurred within the precincts of the University and was allegedly committed by students against a lecturer."**

45. This decision was cited with approval by **Mumbi Ngugi, J** decision in **Alex Mburu Gitau vs. Kenyatta University [2015] eKLR** in which the learned Judge expressed herself as follows:

> **"The petitioner's argument in this regard is similar to the applicants' in the above case, and just as fascinating, but ultimately, untenable. He was accused of participating in incidents of robbery with violence against his colleagues at the university at the railway line and the respondent's perimeter wall. His argument, if accepted, would mean that the respondent, even if a criminal offence was committed inside its wall, or even a lecture theatre, would have no power to discipline the perpetrator. It is an argument that I find unacceptable, and unsupportable. It is my view, and I so hold, that the respondent was within its jurisdiction in subjecting the petitioner to its disciplinary processes."**

46. Although the Applicant has attempted to draw a distinction between the two cases that in ***Wagunza Case*** the Court was dealing with what amounted to trespass and conversion, with due respect that, in my view, is a distinction without a difference. Theft is actually a conversion of another person's property. Whereas the disciplinary proceedings may be an inquiry into what may as well amount to a criminal offence, the mere fact that the facts constitute both, does not amount to the disciplinary tribunal constituting itself into a criminal court since a criminal court is not bound by the findings of a disciplinary tribunal whose standard of proof may not necessarily be the same as in criminal cases. In my view the facts giving rise to disciplinary proceedings may well constitute a criminal offence and the Respondent's Disciplinary Committee is clothed with the jurisdiction to deal with all general offences committed by students in their day to day activities with the only restriction being that the Committee cannot entertain what the University considers as major offences. Unfortunately, the decision as to what amounts to a major offence for the purposes of the disciplinary proceedings is left to the University. The law as I understand it is that where the jurisdiction of an inferior court or tribunal depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction. Where the Tribunal has made a factual finding, it is not for this Court in judicial review proceedings to interfere with such factual finding since such a decision would go to the merit of the decision and by interfering with such a finding this Court would be acting as an appellate court rather than a judicial review court. To interfere in such determinations unless the same is shown to be unreasonable would amount to the Court substituting its discretion for that of the Tribunal and that is not the role of the judicial review Court. The Court would however interfere where such factual findings show that the Tribunal has no jurisdiction but the Tribunal erroneously finds that it in fact has jurisdiction.

47. In **Republic vs. Kenyatta University and 2 Others Ex Parte Jared Juma** (supra) the Court held;

> **"… the University has jurisdiction to conduct its own disciplinary proceedings. This must necessarily be so. The suggestion that disciplinary proceedings are a matter for courts is untenable… Statute xxx Schedule 4(4) establishes the Disciplinary Committee of Kenyatta University. The existence of such disciplinary committee has always been recognized by the**

courts. The courts also recognize that their relationship with such committees is limited to supervision."

48. Accordingly, I disagree with the Petitioner that the Respondent had no jurisdiction to inquire into the matters relating to the loss of the complainant's laptop.

49. It was contended by the applicant that the manner in which the Respondent conducted the said disciplinary proceedings was unfair and that the rules of natural justice were violated in the process. The Petitioner contended that the complainant gave evidence in his absence and that he was not permitted to put questions to the complainant.

50. The Courts have over a period of time distinguished between Court litigation or trials and purely disciplinary proceedings. Before dealing with the authorities, it is important to note that the principles running through these cases have now fortunately been legislated in the ***Fair Administrative Action Act, 2015***. Section 4 thereof provides as follows:

> ***(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) Every person has the right to be given written reasons for any administrative action that is taken against him.***
>
> ***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision***
>
> > ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
> >
> > ***(b) an opportunity to be heard and to make representations in that regard;***
> >
> > ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
> >
> > ***(d) a statement of reasons pursuant to section 6;***
> >
> > ***(e) notice of the right to legal representation, where applicable;***
> >
> > ***(f) notice of the right to cross-examine or where applicable; or***
> >
> > ***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***
>
> ***(4) The administrator shall accord the person against whom administrative action is taken an opportunity to***
>
> > ***(a) attend proceedings, in person or in the company of an expert of his choice;***
> >
> > ***(b) be heard;***
> >
> > ***(c) cross-examine persons who give adverse evidence against him; and***
> >
> > ***(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.***
>
> ***(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.***

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 4l of the Constitution, the administrator may act in accordance with that different procedure.

51. It is therefore clear that an opportunity to be heard must not necessarily be by way of oral hearing as is usually the position when one is charged before a court of law. I agree with **Michael Fordham** in ***Judicial Review Handbook*** 4th Edn. at page 1007 that:

> **"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".**

52. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

> **"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made."**

53. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

> **"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."**

54. In my view, reference to hearing the other side must have been with respect to oral representation since I do not see how a decision affecting a person can be made without affording that person an opportunity to present his case either orally or by in writing in light of the provisions of Article 47 and 50 of the Constitution. However, the law is clear that where a tribunal decides to hear one party then it must hear all the parties. See **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR .**

55. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

> **"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."**

56. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

> **"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing**

or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

57. However, the law is now clear that where adverse evidence is given about a person, the person is to be afforded an opportunity to cross-examine the said witnesses unless the rules and regulations guiding the particular disciplinary proceedings provide otherwise. I have gone through the copy of the regulations dealing with disciplinary procedures as exhibited by the Respondent herein and nowhere in the said regulations has the right of cross-examination been abridged or curtailed.

58. From the proceedings, exhibited there is no evidence that the Applicant was afforded an opportunity of cross-examining the Complainant as provided for by the law. If the Respondent intended to abridge the Applicant's statutory right to cross-examine the Complainant, assuming that the Respondent could do so without such course being provided for in the regulations, the Respondent would have been expected to at least inform the Petitioner of this intention. I therefore associate myself with the substance of the holding by **Korir, J** in **Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] KLR** that if in the circumstances of the case it would be impossible to hear any party affected, such a party must be given reasons for the decision being made. In the same vein **Lord Denning** in **Salvarajan vs. Race Relations Board [1976] 1 All ER 12** held that:

"The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way be adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it."

59. As the law required that the Complainant be availed for cross-examination, there is no way the manner in which the respondent conducted its proceedings can be said to have met the threshold under Article 47 of the Constitution pursuant to which the ***Fair Administrative Action Act*** was enacted. It is not contended by the respondent that its disciplinary rules or procedure provided for a different mode of conducting proceedings from that provided under the Act. Even if there existed such a procedure it had to comply with the letter and spirit of Article 47 of the Constitution.

60 It is contended that since the applicant had a right of appeal, he ought not to have commenced these proceedings. The need to resort to alternative remedies was well articulated by the Court of Appeal in **Speaker of National Assembly vs. NjengaKarume [2008] 1 KLR 425,** where it held that;

"In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

61. It is now a 'cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy

62. Section 9(2) of the **Fair Administrative Action Act**, No. 4 of 2015 provides:

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

63. I am in complete agreement and in the instant case, while I recognize that the aforesaid general principle, must be respected, I must also bear in mind the nature of the dispute before me viz-a-viz the jurisdiction vested in the Appellate Tribunal. As held in was held by this Court in **Republic vs. Ministry**

of Interior and Coordination of National Government and Another ex parte ZTE Judicial Review Case No. 441 of 2013:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though *the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate*."** [Emphasis mine].

64. It therefore follows that where the alternative remedy provided by statute is less convenient or otherwise less appropriate, the Court will not compel the Applicant to go for that remedy. This position, in my view, is contemplated by section 9(4) of the ***Fair Administrative Action Act*** which provides that:

> ***Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

65. Whereas the above provision contemplates that an application for exemption be made by the applicant, it is my view, that the provision does not oust the Court's inherent jurisdiction to do justice in deserving situations. In my view the right to a fair hearing under Article 47 is a fundamental right that cannot be taken away by a right of appeal. It ought to be remembered that the right of appeal usually deals with the merits of the decision made rather than the process of arriving at the decision. Whereas as in this case, the Petitioner alleges, which allegation, based on the evidence on record is not satisfactorily controverted, that the very process leading to the decision was itself not only unprocedural but may well amount to a violation of Article 50 of the Constitution, it does not augur well to contend that an appeal was the most convenient, beneficial and effective remedy in the circumstances.

66. Having considered the issues raised in this application, it is my view and I hereby hold that the disciplinary proceedings undertaken by the respondent which culminated in the impugned decision were clearly improper and failed to meet both the constitutional and the relevant statutory threshold. The powers and the procedure before disciplinary bodies was dealt with in **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** where the Court expressed itself as follows:

> **"The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute…Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire unto the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called "conduct short of expected standards of professionalism", and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully…Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee's findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong**

considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity…Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."

67 The Petitioner however contended that the Respondents did not give reasons for their decision. I have perused the proceedings and it is clear that reasons were given. Whereas the reasons may be considered by other people as not being satisfactory, that is not the same thing as failing to give reasons. This Court in proceedings of this nature does not interfere with decisions made by other bodies acting within their jurisdiction simply because the evidence adduced was unsatisfactory.

68. In **Civil Appeal No. 180 of 2013 - Isaack Osman Sheikh vs. IEBC & Others** where the Court expressed itself in the following terms:

"A judicial review of administrative, judicial and quasi-judicial action and decisions of inferior bodies and tribunals by the High Court in exercise of its supervisory jurisdiction flowing from Article 165(6) of the Constitution is not in the nature of an appeal. It concerns itself with process and is not a merit review of the decision of those other bodies. And it does not confer on the High Court a power to arrogate to itself the decision-making power reserved elsewhere."

69. Further reliance was placed on **Daniel Nyongesa and Others vs. Egerton University College CA No. 90 of 1989** in which the Court **(Nyarangi JA)** stated:

"Courts are very loathe to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run Universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decision has been made without fairly and justly hearing the person concerned or the other side… it is the duty of the courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people. Whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or inquiry are of an internal disciplinary character."

70 In the premises I find merit in this Petition. This decision however, has nothing to do with the merits or otherwise of the respondent's decision. Whereas the respondent's decision may well have been merited the process through which it arrived at its decision was clearly flawed and it cannot be allowed to stand.

Order

71 In the result I grant the following orders:

1. **A declaration that finding of the Respondent carried in the Respondent's letter dated 4th August 2014 finding the Petitioner guilty of theft contravened the Petitioner's right to fair trial guaranteed by Articles 47 and 50(1) of the Constitution of Kenya.**
2. **An order of *certiorari* is hereby issued removing into this Court for the purposes of being quashed and quashing the decision of the Respondent carried in the letter dated 4th August 2014 and any consequential orders.**
3. **The petitioner will have the costs of this petition.**

Dated at Nairobi this 31st day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Omondi for Mr. Mogere for the Respondent

Cc Mutisya